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Docket No. 93-252
Ex Parte Presentation

EX PARTE OR LATE FILED

August 26, 1994

The Honorable Susan P. Ness
Federal Communications Commission
1919 'M' Street, N.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

RE: PENDING SMR Applications & The MAXCELL-Cellular Case

Dear Commissioner Ness:

Eleven days ago, the first-above-identified SMR licensees and applicants (who have been successful and financially qualified cellular system builders and operators, as detailed in our earlier letter and referred to below as HGTV and SGTV), wrote to request that the FCC not return pending SMR applications. We have just been advised that the FCC is now considering another equally UNdemocratic mechanism to accomplish the same result: that is, converting pending applications (where more than one seek the same channels) to auction and/or permitting new applications for those same channels.

No matter what excuse or method that the Commission uses to subject pending SMR applications to auction, the illegalities and injustices will be effectively identical! Applications researched and prepared 12-18 months ago and filed 9-12 months ago should not be disrupted now, anymore than issued licenses should be rescinded or existing operations terminated. The principals of property rights and the ex post facto laws are the same in all three cases.

The cellular-Maxcell case, which we have discussed with our attorneys, does NOT justify a failure to process pending SMR applications on a first-come, first-served basis, because (1) the statute mandated the change as to those cellular applications; the auction legislation does not do that as to SMR; and (2) no new applicants were permitted in cellular; and (3) every single applicant became a winner of his pro rata portion of those applications; here, pending SMR applicants would lose thousands of

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dollars and/or be forced to incur more costs via auctions; and (4) each cellular application was filed mutually exclusive, not in a first-come first-served licensing system; and (5) there was advance notice or warning of the likely change in prior Commission pronouncements; finally, (6) even the Commission's August 9th News Release DC-2638 is deceptive and misleading, in that it does not even address pending applications, casting a rather clandestine air of chicanery over this abrupt, emergency-basis, hurry-up reversal of rules. In any event, the Maxcell case will not legalize the Commission's ruthless disregard of the rights of small businesses in this case for the foregoing reasons.

Further, the pending applications are by small companies and minorities and they are applying for the very small markets. Relatively speaking, they won't bring the bonanza auction dollars, but, if processed and granted, they will bring at least some form of competition to the Nextel-MCI-Motorola SMR monopoly that the FCC has created. The Commission shouldn't trade Nextel's only competition for a few dollars.

Changing the pending, first come, first served SMR applications to an auction system will surely bring protracted litigation upon the Commission, and perhaps even injunctions, and, at the least, major legal taints or clouds will hang over each such auctioned-license for years to come, tying the SMR industry in knots. If the Commission is defeated in the courts, as it should and surely will be, it will represent a major embarrassment for those seeking to hastily and covertly trample the rights of small business people.

HGTV and SGTV beg the Commission to rethink its actions toward pending applications; put yourselves in 'the shoes' of the pending applicants; imagine how you would feel. Please be people of your word; obey the laws; abide by your own rules; and please process the pending SMR applications.

Very truly yours,
HGTV, Inc. & SGTV, Inc.

By 
Larry A. Gilbert
President of HGTV
Attorney-in-Fact of SGTV, Inc.